

K. Randolph Moore, Esq. SBN 106933
Tanya Moore, Esq. SBN 206683
MOORE LAW FIRM, P.C.
332 N. Second Street
San Jose, CA 95112
Telephone (408) 271-6600
Facsimile (408) 298-6046

Attorneys for Plaintiff
Alma Clarisa Hernandez

E-filing

ORIGINAL
FILED

2010 APR 26 P 4:11

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
N.D. CA - SAN JOSE

ADR
UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ALMA CLARISA HERNANDEZ,

Plaintiff,

vs.

WALGREEN CO. dba WALGREENS
PHARMACY and CAPITOL SQUARE
PARTNERS, A CALIFORNIA
LIMITED PARTNERSHIP,

Defendants.

No.

Plaintiff's Complaint

CV 10-01798

PVT

JW

I. SUMMARY

1. This is a civil rights action by plaintiff ALMA CLARISA HERNANDEZ ("Hernandez") for discrimination at the building, structure, facility, complex, property, land, development, and/or surrounding business complex known as:

Walgreens
350 N. Capitol Ave
San Jose, CA 95133
(hereinafter "the Store")

Hernandez v. Walgreen Co., et al.

Plaintiff's Complaint

2. HERNANDEZ seeks damages, injunctive and declaratory relief, attorney fees and costs, against WALGREEN CO., dba WALGREENS and CAPITOL SQUARE PARTNERS, A CALIFORNIA LIMITED PARTNERSHIP (hereinafter referred to collectively as Defendants), owners and operators of Walgreens ("Store"), pursuant to the Americans with Disabilities Act of 1990, (42 U.S.C. §§ 12101 et seq.) and related California statutes.

II. JURISDICTION

3. This Court has original jurisdiction under 28 U.S.C. §§ 1331 and 1343 for ADA claims.

4. Supplemental jurisdiction for claims brought under parallel California law – arising from the same nucleus of operative facts – is predicated on 28 U.S.C. § 1367.

5. Hernandez's claims are authorized by 28 U.S.C. §§ 2201 and 2202.

III. VENUE

6. All actions complained of herein take place within the jurisdiction of the United States District Court, Northern District of California, and venue is invoked pursuant to 28 U.S.C. § 1391(b),(c).

IV. PARTIES

7. Defendants own, operate, and/or lease the Store, and consist of a person (or persons), firm, and/or corporation.

8. Hernandez was diagnosed with severe scoliosis over 15 years ago and is confined in a wheelchair. Consequently, Hernandez is "physically disabled," as defined by all applicable California and United States laws, and a member of the public whose rights are protected by these laws.

V. FACTS

Hernandez v. Walgreen Co., et al.

Plaintiff's Complaint

1 9. The Store is a public accommodation facility, open to the public,
2 which is intended for nonresidential use and whose operation affects commerce.

3 10. Hernandez visited the Store and encountered barriers (both
4 physical and intangible) that interfered with – if not outright denied – her ability
5 to use and enjoy the goods, services, privileges, and accommodations offered at
6 the facility. To the extent known by Hernandez, the barriers at the Store
7 included, but are not limited to, the following:

- 8 1) A warning sign regarding the penalty for unauthorized use of designated
9 disabled parking spaces is not posted conspicuously at EACH entrance to
10 the off-street parking facilities;
- 11 2) Each warning sign does not state: “UNAUTHORIZED VEHICLES
12 PARKED IN DESIGNATED ACCESSIBLE SPACES NOT
13 DISPLAYING DISTINGUISHING PLACARDS OR SPECIAL LICENSE
14 PLATES ISSUED FOR PERSONS WITH DISABILITIES WILL BE
15 TOWED AWAY AT OWNER’S EXPENSE. TOWED VEHICLES MAY
16 BE RECLAIMED AT (Address) OR BY TELEPHONING (Phone
17 Number);
- 18 3) The phone number or address where towed vehicles can be reclaimed is
19 not posted in the appropriate section on the sign and is not a permanent
20 part of the sign;
- 21 4) The size of the lettering on the sign is less than 1” in height;
- 22 5) The size of the sign is less than 17” x 22” in size (minimum 24” x 24” size
23 recommended).
- 24 6) The correct number of standard accessible and van-accessible parking
25 stalls is not provided on the site;
- 26 7) Surface of the parking spaces and access aisles exceeds 1:50 gradient
27 (2.0%) in any direction;

28 *Hernandez v. Walgreen Co., et al.*

Plaintiff’s Complaint

- 1 8) Parking space is less than 18' long;
- 2 9) Parking space is less than 9' wide;
- 3 10) Access aisle on the passenger side is less than 18' x 5';
- 4 11) Van accessible parking space is less than 9' wide;
- 5 12) Access aisle on the passenger side of the van accessible parking
- 6 space is less than 8' wide;
- 7 13) The access aisle is not placed on the side opposite the driver's side
- 8 when the vehicle is going forward into the parking space (i.e. the passenger
- 9 side of the vehicle);
- 10 14) Each parking space reserved for persons with disabilities is not
- 11 identified by a reflectorized sign permanently posted immediately adjacent
- 12 to and visible from each stall or space, consisting of a profile view of the
- 13 International Symbol of Accessibility in white on a dark blue background;
- 14 15) Area of the sign is smaller than 70 square inches;
- 15 16) Van accessible parking space does not have an additional sign
- 16 stating "Van Accessible" mounted below the Symbol of Accessibility;
- 17 17) An additional sign below the symbol of accessibility does not state
- 18 "Minimum Fine \$250.00";
- 19 18) The surface of each accessible parking pace does not have a surface
- 20 identification duplicating either of the following schemes:
- 21 a. By outlining or painting the stall or space in blue and outlining on
- 22 the ground in the stall or space in white or suitable contrasting color
- 23 a profile view depicting a wheelchair with occupant;
- 24 b. By outlining a profile view of a wheelchair with occupant in white
- 25 on blue background. The profile view shall be located so that it is
- 26 visible to a traffic enforcement officer when a vehicle is properly
- 27 parked in the space and shall be 36" high by 36" wide;
- 28

Hernandez v. Walgreen Co., et al.

Plaintiff's Complaint

- 19) The loading and unloading access aisle is not marked by a border that is painted blue;
- 20) There are no hatched lines that are a maximum of 36" on center painted with a contrasting color;
- 21) The built up curb ramp is not properly configured or painted;
- 22) The built up curb ramp contains unlevel warped surface;
- 23) There is no accessible route provided within the boundary of the site to an accessible building entrances from:
 - a. Public transportation stops;
 - b. Accessible parking spaces;
 - c. Accessible passenger loading zones;
 - d. Public streets and sidewalks.
- 24) Signage containing the International Symbol of Accessibility is not located at every primary public entrance and at every major exterior junction where the accessible route of travel diverges from the regular circulation path along or leading to an accessible route of travel;
- 25) The entrance door to the multiple-accommodation restroom is not accessible;
- 26) The entrance door to the restroom hallway requires more than 5 pounds of maximum pressure to operate;
- 27) The entrance door to the restroom facility requires more than 5 pounds of maximum pressure to operate
- 28) Handle on the restroom hallway is not easy to grasp with one hand and requires tight grasping, tight pinching or twisting of the wrist to operate;
- 29) There is insufficient clearance provided on the latch side of the restroom hallway door (returning to the store);

Hernandez v. Walgreen Co., et al.

Plaintiff's Complaint

- 1 30) There is insufficient clearance provided on the latch side of the
- 2 restroom door (returning to the restroom);
- 3 31) Door closers are set to take less than 3 seconds to close from an
- 4 open position of 70 degrees to within 3" of the latch, measured to the
- 5 leading edge of the door;
- 6 32) There is insufficient clear floor are provided on the pull side of the
- 7 door (entering the stall);
- 8 33) The stall door is not equipped with an automatic closing device;
- 9 34) The inside and outside of the compartment door is not equipped with
- 10 a loop or U-shaped handle located immediately below the latch;
- 11 35) Drain and hot water piping is not insulated or configured to prevent
- 12 contact;
- 13 36) There are sharp and abrasive elements under lavatory;
- 14 37) A minimum of 30"x48" clear floor space is not provided to allow
- 15 forward parallel approach to the lavatory;
- 16 38) Operable part of soap dispenser is not located a maximum of 40"
- 17 above floor;
- 18 39) Coat hook inside the stall is located outside of the appropriate reach
- 19 ranges;
- 20 40) Sanitary facilities are not displaying signs in a minimum of two
- 21 locations: one type located on the doorway to the facility, and another type
- 22 mounted on the wall adjacent to the latch side of the door;
- 23 41) The International Symbol of Accessibility is not posted at accessible
- 24 sanitary facilities;
- 25 42) The restroom identification signage is not located on the wall
- 26 adjacent to the latch side of the door;
- 27 43) Accessible stall is not identified by an ISA;
- 28

Hernandez v. Walgreen Co., et al.

Plaintiff's Complaint

- 1 44) The displayed goods are located outside of reach;
2 45) There is no sign provided offering assistance to disabled patrons;
3 46) There is no accessible cashier stand provided;
4 47) The floor mats and doormat at the entrance are not properly secured.
5 These barriers prevented Hernandez from enjoying full and equal access.

6 11. Hernandez was also deterred from visiting the Store because she
7 became aware that the Store goods, services, facilities, privileges, advantages,
8 and accommodations were unavailable to physically disabled patrons (such as
9 herself). She continues to be deterred from visiting the Store because of the
10 future threats of injury created by these barriers.

11 12. Hernandez also encountered barriers at the Store, which violate
12 state and federal law, but were unrelated to her disability. Nothing within this
13 complaint, however, should be construed as an allegation that Hernandez is
14 seeking to remove barriers unrelated to her disability.

15 13. Defendants knew that these elements and areas of the Store were
16 inaccessible, violate state and federal law, and interfere with (or deny) access to
17 the physically disabled. Moreover, Defendants have the financial resources to
18 remove these barriers from the Store (without much difficulty or expense), and
19 make the Store accessible to the physically disabled. To date, however,
20 Defendants refuse to either remove those barriers or seek an unreasonable
21 hardship exemption to excuse non-compliance.

22 14. At all relevant times, Defendants have possessed and enjoyed
23 sufficient control and authority to modify the Store to remove impediments to
24 wheelchair access and to comply with the Americans with Disabilities Act
25 Accessibility Guidelines and Title 24 regulations. Defendants have not
26 removed such impediments and have not modified the Store to conform to
27 accessibility standards. Defendants have intentionally maintained the Store and

28 *Hernandez v. Walgreen Co., et al.*

Plaintiff's Complaint

1 in its current condition and has intentionally refrained from altering the Store
2 so that it complies with the accessibility standards.

3 15. Hernandez further alleges that the (continued) presence of barriers
4 at the store so obvious as to establish Defendants discriminatory intent.¹ On
5 information and belief, Hernandez avers that evidence of this discriminatory
6 intent includes Defendants' refusal to adhere to relevant building standards;
7 disregard for the building plans and permits issued for the Store; conscientious
8 decision to the architectural layout (as it currently exists) at the Store; decision
9 not to remove barriers from the Store; and allowance that Defendants' property
10 continues to exist in its non-compliance state. Hernandez further alleges, on
11 information and belief, that the Store is not in the midst of a remodel, and that
12 the barriers present at the Store are not isolated (or temporary) interruptions in
13 access due to maintenance or repairs.²

14 VI. FIRST CLAIM

15 Americans with Disabilities Act of 1990

16 Denial of "Full and Equal" Enjoyment and Use

17 16. Hernandez incorporates the allegations contained in paragraphs 1
18 through 15 for this claim.

19 17. Title III of the ADA holds as a "general rule" that no individual
20 shall be discriminated against on the basis of disability in the full and equal
21 enjoyment (or use) of goods, services, facilities, privileges, and
22 accommodations offered by any person who owns, operates, or leases a place of
23 public accommodation. 42 U.S.C. § 12182(a).

26 ¹ E.g., Gunther v. Lin, 144 Cal.App.4th 223, fn.6

27 ² Id.; 28 C.F.R. § 36.211(b)

28 *Hernandez v. Walgreen Co., et al.*

1 18. Defendants discriminated against Hernandez by denying “full and
2 equal enjoyment” and use of the goods, services, facilities, privileges and
3 accommodations of the Store during each visit and each incident of deterrence.

4 Failure to Remove Architectural Barriers in an Existing Facility

5 19. The ADA specifically prohibits failing to remove architectural
6 barriers, which are structural in nature, in existing facilities where such removal
7 is readily achievable. 42 U.S.C. § 12182(b)(2)(A)(iv). The term “readily
8 achievable” is defined as “easily accomplishable and able to be carried out
9 without much difficulty or expense.” *Id.* § 12181(9).

10 20. When an entity can demonstrate that removal of a barrier is not
11 readily achievable, a failure to make goods, services, facilities, or
12 accommodations available through alternative methods is also specifically
13 prohibited if these methods are readily achievable. *Id.* § 12182(b)(2)(A)(v).

14 21. Here, Hernandez alleges that Defendants can easily remove the
15 architectural barriers at Store without much difficulty or expense, and that
16 Defendants violated the ADA by failing to remove those barriers, when it was
17 readily achievable to do so.

18 22. In the alternative, if it was not “readily achievable” for Defendants
19 to remove the Store’s barriers, then Defendants violated the ADA by failing to
20 make the required services available through alternative methods, which are
21 readily achievable.

22 Failure to Design and Construct and Accessible Facility

23 23. On information and belief, the Store was designed and constructed
24 (or both) after January 26, 1992 – independently triggering access requirements
25 under Title III or the ADA.

26 24. The ADA also prohibits designing and constructing facilities or
27 first occupancy after January 16, 1993, that aren’t readily accessible to, and

28 *Hernandez v. Walgreen Co., et al.*

Plaintiff’s Complaint

1 usable by, individuals with disabilities when it was structurally practicable to do
2 so. 42 U.S.C. § 12183(a)(1).

3 25. Here, Defendants violated the ADA by designing and constructing
4 (or both) the Store in a manner that was not readily accessible to the physically
5 disabled public – including Hernandez – when it was structurally practical to do
6 so.³

7 Failure to Make an Altered Facility Accessible

8 26. On information and belief, the Store was modified after January
9 26, 1992, independently triggering access requirements under the ADA.

10 27. The ADA also requires that facilities altered in a manner that
11 affects (or could affect) its usability must be made readily accessible to
12 individuals with disabilities to the maximum extent feasible. 42 U.S.C. §
13 12183(a)(2). Altering an area that contains a facility's primary function also
14 requires adding making the paths of travel, bathrooms, telephones, and drinking
15 fountains serving that area accessible to the maximum extent feasible. *Id.*

16 28. Here, Defendants altered the Store in a manner that violated the
17 ADA and was not readily accessible to the physically disabled public –
18 including Hernandez – to the maximum extent feasible.

19 Failure to Modify Existing Policies and Procedures

20 29. The ADA also requires reasonable modifications in policies,
21 practices, or procedures, when necessary to afford such goods, services,
22 facilities, or accommodations to individuals with disabilities, unless the entity
23 can demonstrate that making such modifications would fundamentally alter
24 their nature. 42 U.S.C. § 12182(b)(2)(A)(ii).

25 30. Here, Defendants violated the ADA by failing to make reasonable
26 modifications in policies, practices, or procedures at the Store, when these
27

28 *Hernandez v. Walgreen Co., et al.*

Plaintiff's Complaint

1 modifications were necessary to afford (and would not fundamentally alter the
2 nature of) these goods, services, facilities, or accommodations.

3 31. Hernandez seeks all relief available under the ADA (i.e., injunctive
4 relief, attorney fees, costs, legal expense) for these aforementioned violations.
5 42 U.S.C. § 12205.

6 32. Hernandez also seeks a finding from this Court (i.e., declaratory
7 relief) that Defendants violated the ADA in order to pursue damages under
8 California's Unruh Civil Rights Act or Disabled Persons Act.

9 VII. SECOND CLAIM

10 Disabled Persons Act

11 33. Hernandez incorporates the allegations contained in paragraphs 1
12 through 30 for this claim.

13 34. California Civil Code § 54 states, in part, that: Individuals with
14 disabilities have the same right as the general public to the full and free use of
15 the streets, sidewalks, walkways, public buildings and facilities, and other
16 public places.

17 35. California Civil Code § 54.1 also states, in part, that: Individuals
18 with disabilities shall be entitled to full and equal access to accommodations,
19 facilities, telephone facilities, places of public accommodation, and other places
20 to which the general public is invited.

21 36. Both sections specifically incorporate (by reference) and
22 individual's rights under the ADA. See Civil Code §§ 54(c) and 54.1(d).

23 37. Here, Defendants discriminated against the physically disabled
24 public – including Hernandez – by denying them full and equal access to the
25 Store. Defendants also violated Hernandez's rights under the ADA, and
26

27 ³ Nothing within this Complaint should be construed as an allegation that plaintiff is bringing
28 this action as a private attorney general under either state or federal statutes.

Hernandez v. Walgreen Co., et al.

therefore, infringed upon or violated (or both) Hernandez's rights under the Disabled Persons Act.

38. For each offense of the Disabled Persons Act, Hernandez seeks actual damages (both general and special damages), statutory minimum damages of one thousand dollars (\$1,000), declaratory relief, and any other remedy available under California Civil Code § 54.3.

39. She also seeks to enjoin Defendants from violating the Disabled Persons Act (and ADA) under California Civil Code § 55, and to recover reasonable attorneys' fees and incurred under California Civil Code §§ 54.3 and 55.

VIII. THIRD CLAIM

Unruh Civil Rights Act

40. Hernandez incorporates the allegations contained in paragraphs 1 through 30 for this claim.

41. California Civil Code § 51 states, in part, that: All persons within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

42. California Civil Code § 51.5 also states, in part that: No business establishment of any kind whatsoever shall discriminate against any person in this state because of the disability of the person.

43. California Civil Code § 51(f) specifically incorporates (by reference) an individual's rights under the ADA into the Unruh Act.

44. Defendants aforementioned acts and omissions denied the physically disabled public — including Hernandez — full and equal accommodations, advantages, facilities, privileges and services in a business establishment (because of their physical disability).

Hernandez v. Walgreen Co., et al.

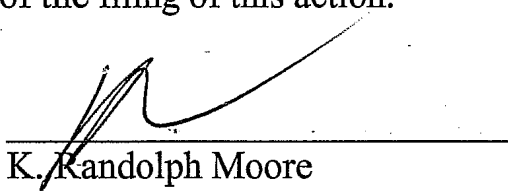
Plaintiff's Complaint

X. PRAYER FOR RELIEF

WHEREFORE, Hernandez prays judgment against Defendants for:

1. Injunctive relief, preventive relief, or any other relief the Court deems proper.
2. Declaratory relief that Defendants violated the ADA for the purposes of Unruh Act or Disabled Persons Act damages.
3. Statutory minimum damages under either sections 52(a) or 54.3(a) of the California Civil Code (but not both) according to proof.
4. Attorneys' fees, litigation expense, and costs of suit.⁴
5. Interest at the legal rate from the date of the filing of this action.

Dated: April 26, 2010


K. Randolph Moore
Attorney for Plaintiff

⁴ This includes attorneys' fees under California Code of Civil Procedure § 1021.5.

Hernandez v. Walgreen Co., et al.

Plaintiff's Complaint